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UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress

In the Matter of: **DETERMINATION OF ROYALTY RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (*Phonorecords IV*)**	**Docket No. 21-CRB-0001-PR (2023-2027)**

REPLY IN FURTHER SUPPORT OF EXPEDITED JOINT MOTION FOR SUSPENSION OF VOLUNTARY NEGOTIATION PERIOD AND SUBSEQUENT CASE EVENTS AND DEADLINES

Google LLC, Spotify USA Inc., Pandora Media, LLC, the National Music Publishers' Association, Nashville Songwriters Association International and George Johnson (collectively, "Joint Movants") respectfully submit this reply in further support of their joint motion (the "Joint Motion") to suspend the Voluntary Negotiation Period ("VNP") and subsequent case events in the above-referenced proceeding (the "Proceeding"), and in response to Amazon's opposition to the Motion (the "Opposition").

I. THE JUDGES HAVE THE AUTHORITY TO SUSPEND THE VOLUNTARY NEGOTIATION PERIOD

Contrary to Amazon's suggestion, the Copyright Act does not prohibit the Judges from suspending the 3-month voluntary negotiation period. Under the statute, the "voluntary negotiation period … *shall be* 3 months." 17 U.S.C. § 803(b)(3)(B). Nothing in the text, purpose, or history of the provision suggests that Congress meant to require a single unbroken period. To the contrary, all of the available evidence indicates that the Judges are free to divide the requisite time as circumstances may dictate.

First, as a practical matter, the suggestion that a *suspension* of the voluntary negotiation period effectively *lengthens* it is simply incorrect. If the Judges suspend the voluntary negotiation

period, the dedicated statutory window for that conduct is also suspended. To claim, as Amazon does, that if the Judges decide to press "pause" on the voluntary negotiation period, some invisible statutory clock continues to run is simply wrong.

The history of the voluntary negotiation period provision makes clear that Congress's purpose in adopting it was to facilitate settlement discussions. *See* H.R. Rep. 108-408 (Jan. 30, 2004), 2004 WL 199229 at *30. In view of that legislative history and purpose, Amazon's construction of the 3-month clause is a flatly impermissible reading of the text. *See United States v. Braxtonbrown-Smith*, 278 F.3d 1348, 1352 (D.C. Cir. 2002) (a court "must avoid an interpretation that undermines congressional purpose considered as a whole when alternative interpretations consistent with the legislative purpose are available").[1] To interpret the clause as requiring three *uninterrupted* months of negotiation, even where doing so would *impede* the prospects of settlement, contravenes all of the available evidence about what Congress sought to achieve—to wit, "conflict resolution between the parties." By contrast, the Joint Movants' position furthers that goal by according the Judges the full breadth of discretion conveyed by the durational term in the statute, unconstrained by an atextual requirement that the period at issue necessarily be unbroken. The words on the page say that the voluntary negotiation period has to

[1] *See also Horvath v. United States*, 896 F.3d 1317, 1321 (Fed. Cir. 2018) (reversing agency's interpretation of statute as requiring that overtime be worked consecutively in order to trigger compensation where statute did not expressly require that hours run consecutively, and requirement was " not consistent with the history and purpose of the statute"); *Cannon v. Wittek Cos.*, 60 F.3d 1282, 1284 (7th Cir. 1995) (90 days in a contractual waiting period need not run consecutively "[i]n the absence of an explicit provision that the days be consecutive"); *In re Interrogatory on House Joint Resolution 20-1006*, 2020 CO 23, 2020 WL 1855215, at *9 (Co. Apr. 1, 2020) ("if the unambiguous intent … had been to mandate consecutive counting … the drafters simply could have included the word 'consecutive'"). The Judges' decision to construe a 60-day discovery period under § 803(b)(6)(C) as running consecutively (Opp. at 3) does prevent them from reaching a different finding here, where requiring the period at issue to run consecutively in all cases would be contrary to Congressional purpose.

occupy three months. It says nothing about which three months those must be, when they have to occur, or that they must take place without interruption even for good cause.

Allegheny Defense Project v. FERC, 964 F.3d 15 (D.C. Cir. 2020) does not stand for the broad proposition that an agency may never toll a statutory period, as Amazon argues. Interpreting the case in that manner would run contrary to the "well-settled" principle that where Congress has mandated that an agency comply with a particular time period "but has not set forth the consequences of exceeding that period, ordinarily the time period is directory rather than mandatory." *Gottlieb v. Pena*, 41 F.3d 730, 733 (D.C. Cir. 1994); *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003) (holding that the Supreme Court had not, since 1986, "ever construed a provision that the Government 'shall' act within a specified time, without more, as a jurisdictional limit precluding action later); *Nielsen v. Preap*, 139 S. Ct. 954, 967 (2019) (same); *see also Nat. Res. Def. Council, Inc. v. Train*, 510 F.2d 692, 712 (D.C. Cir. 1974) (courts "cannot responsibly mandate flat . . . deadlines when the [agency] demonstrates that additional time is necessary" to ensure a reasoned decision). Interpreting section 803(b)(3)(B) to require a consecutive time period would unduly constrain the Judges' ability to manage the proceedings before them, not only for *Phonorecords IV*, but for all proceedings in the future. It is inconsistent with the discretion the Copyright Act has otherwise accorded. Amazon concedes that the Judges have the discretion to initiate the negotiation period at a time of their choosing. 17 U.S.C. § 803(b)(3)(A). Congress was not so concerned about the Judges' ability to manage the process to conclusion by a certain date that it micromanaged when the negotiation period must commence. It makes no sense why Congress would trust the Judges with that decision but suddenly lose faith and take away their discretion over the schedule once the period is commenced.

II. THE JUDGES ARE NOT REQUIRED UNDER SECTION 803 TO DELIVER THE DETERMINATION IN THIS PROCEEDING BY DECEMBER 16, 2022

Amazon is also incorrect that the Judges must issue the Initial Determination in this proceeding by December 16, 2022, in advance of a purported December 31, 2022 expiration of the *Phonorecords III* rates. Opp. at 4-5.

The source of that deadline, section 803(c)(1), does not apply here. As explained in Joint Movants' opening submission, *see* Mot. at 4 n.3, the statutory framework divides the world into two different rate categories: those where the rates expire on a certain date and those where they don't. This split can be seen in sections 804(b)(3) and (b)(4), the former of which specifies five-year rate periods (and December 31 expiration dates) for section 114 licenses, and the latter of which leaves the initiation of section 115 proceedings—and thus the expiration of existing rates from the prior period—to the agreement of the parties. The same bifurcation can also be seen in sections 803(d)(2)(A) and (B), which address the effect of newly decided rates. Again, there is one provision (A) for rates that expire "on a specific date" and another (B) for "other cases where rates and terms do not expire on a specified date." Importantly, paragraph (A) clarifies that "expiration on a specific date" occurs "*[w]hen this title* provides that the royalty rates and terms that were previously in effect are to expire on a specified date"—*i.e.*, where there is a *statutory expiration* date as we see for section 114 licenses in 804(b)(3).

As a result, when section 803(c)(1) specifies timing for the issuance of a rate determination in a proceeding where rates "expire on a specified date," that phrase is best understood as another reference to the category of proceeding identified elsewhere in the statute using that same terminology (section 114 proceedings that expire on a specified date) and not to the "other" category (section 115 proceedings) that is consistently set apart in the statute and subject to its own

timing provisions.[2] There is no reason to believe that the reference in section 803(c)(1) to "rates that expire on a specific date" implies—there but nowhere else—that *both* categories of proceedings are intended to be included merely because, as Amazon points out, the sentence does not refer to rates expiring under "this title." Opp. at 5. Indeed, the opposite implication is equally plausible: if Congress had meant to broaden the phrase "expiration on a specified date" beyond its particular use elsewhere in the statute, it would have said so: *e.g.*, "rates that expire on a specific date, including by agreement of the parties."

Regardless, Amazon's argument hinges on all parties in *Phonorecords III* agreeing (per section 115(c)(1)(E)) that the *Phonorecords III* rates and terms arising out of that proceeding expire on December 31, 2022. But that is not and was not the agreement of the parties in *Phonorecords III*, which stated a period of coverage from 2018 through 2022 but did not determine that the rates would necessarily expire at the end of that period.[3] The results under section 115(c)(1)(E) are clear: because there is no "such other period [for expiration] as the parties may agree," the rates for *Phonorecords III* will end, not on December 31, 2022, but rather "on the effective date of successor rates and terms." That, in turn, leads to two consequences in *Phonorecords IV*: first, under section 803(c)(1), the determination need not be delivered by December 16, 2022; second, under section 803(d)(2)(B), the Judges can set the start date for the *Phonorecords IV* rates, which Joint Movants all agree should be set at January 1, 2023. *See* 17

[2] Indeed, section 115(c)(1)(E) refers to rates "ending" rather than "expiring."

[3] Joint Movants agree that by the terms of this proceeding the *Phonorecords IV* rates will apply beginning on January 1, 2023, regardless of when the final determination is published in this proceeding, allowing that the *Phonorecords III* rates may continue on an interim basis after January 1, 2023 until after the publication occurs.

U.S.C. § 803(d)(2)(B) (rates shall take effect after publication of the determination "except as otherwise provided . . . by the Copyright Royalty Judges").

Johnson v. Copyright Royalty Board does not require a different result. While that decision was premised on the parties' prior acquiescence to the 2018-2022 rate period, it was only the start date that was actually dispositive of the retroactivity issue decided on appeal: the Judges "reject[ed] the Services' retroactivity challenge" not because the parties had agreed to a rate period ending on December 31, 2022 (Opp. at 4), but because the services had agreed to a rate period *starting* on January 1, 2018. 969 F.3d 363 (D.C. Cir. 2020).[4]

III. AMAZON FAILS TO ADDRESS THE GOOD CAUSE FOR THE REQUESTED RELIEF AND THE CONCERNS OF EVERY OTHER PARTICIPANT

Amazon's opposition admits that the determination on remand in *Phonorecords III* involves issues relevant to this proceeding, might frustrate submissions in this proceeding, and may require the parties to engage in supplemental briefing, and yet does not meaningfully respond to the concerns of *every other participant in the proceeding*—licensors and licensees both—that running this proceeding in parallel with its statutory predecessor will result in inescapable inefficiencies and potential prejudice.

Amazon instead urges the Judges to press forward with a schedule that would undermine the effectiveness of the Judges' own precedent from *Phonorecords III* remand proceeding, since that precedent cannot guide the participants' written direct submissions in *Phonorecords IV* if

[4] *Johnson* also disposes of Amazon's objection to retroactive rate application here. Opp. at 7-8. Section 803(d)(2)(B) allows the Judges to set the start date for the *Phonorecords IV* rates, as explained above, and does not limit that discretion to a date *after* publication of the determination. And *Johnson* leaves no doubt that if the Judges issue a "prospective announcement" of that start date some 18 months in advance—as would be the case here—that provides "ample public notice of the impending change in rates" and "does not amount to retroactive rate setting" that either "surprise[s]" the participants or "disrupt[s] any reasonable reliance interests." *Johnson*, 969 F.3d. at 380.

those submissions are filed before the Judges issue their *Phonorecords III* Remand Determination. Amazon's demand is likely to leave the Judges with a less informed and useful record in this proceeding. Amazon's casual suggestion that the participants could request an opportunity, "consistent with the existing schedule," to make "narrowly tailored" supplemental submissions after the Remand Determination has issued (Opp. at 9) is inadequate. To begin with, the existing schedule does not afford time for another round of substantive submissions and discovery, and Amazon does not address how its proposal for three rounds of submissions would work in the existing schedule or a modified schedule. Moreover, such a process does not address the wastefulness and prejudice of having core submissions in this proceeding that cannot definitively address the final rates and terms and precedent from the statutory predecessor proceeding.[5]

Indeed, Amazon's claim that it would be "wasteful and inefficient" for the *Phonorecords IV* participants to await the Remand Determination before litigating this proceeding rings hollow; Amazon's contrary proposal that the participants litigate *Phonorecords IV* without the benefit of the *Phonorecords III* precedent is an enormous waste of time and resources, including that of the Judges. It is notable that Amazon stands alone in objecting to the Joint Motion, a testament to the broad consensus on the inefficiencies and potential prejudice that will likely arise from running these proceedings in parallel.

Amazon argues it could be prejudiced by the proposed schedule because it has allegedly interviewed "potential" fact witnesses and made "progress" in developing a rate proposal. Opp.

[5] Amazon's claim that the participants could account for the Remand Determination "in the same way litigants typically address intervening legal decisions: by submitting supplemental briefs as appropriate," (Opp. at 8-9), ignores that the Remand Determination is no mere "intervening legal decision[]" that the participants can reasonably now say may be addressed through briefing alone. The alternative scenario, that some participants may amend their proposals and/or seek to submit new evidence in support thereof after rounds of substantial submissions have completed, is far more concerning.

at 8. Amazon does not explain how any of this admittedly preliminary work would be wasted under the proposed schedule, nor is there any reason to think that this amounts to prejudice, let alone of a sort that outweighs any prejudice that might result from requiring the participants to litigate *Phonorecords IV* without the finality of the predecessor proceeding.[6]

Finally, Amazon's hyperbolic claim that suspension would "create destabilizing rate uncertainty" (Opp. at 6) misses the forest for the trees. The most "stabilizing" path for rates and terms is for the participants to provide the Judges with probative evidence in this proceeding, and for the Judges to reach an informed determination based on that evidence. The Joint Movants' proposal is in service of outcome: it allows the participants to incorporate precedent from the *Phonorecords III* remand proceeding and analysis based on the final *Phonorecords III* rates and terms into their *Phonorecords IV* submissions. In contrast, forcing the two proceedings forward in parallel may result in significant evidentiary and analytical gaps in the record, which are ultimately more destabilizing threats than the potential that the Judges' determination in this proceeding may issue a few months later—a circumstance that has occurred (and will occur in the future)[7] without entirely upsetting the music industry.

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[6] Against the consensus explanation of the significant inefficiencies from running this proceeding before the remand determination issues, Amazon argues conclusorily it would suffer burdens associated with pausing its work "midstream." Opp. at 8. This claim does not withstand scrutiny. Amazon claims that it would "need to re-interview witnesses to account for new facts or fading memories" (*id.*), ignores that this is the reality of all litigation on all schedules, and does not explain how there is a material difference in burden from the proposed schedule change (which would likely be minor compared to the kinds of schedule changes that occur in federal and state court proceedings), nor why Amazon has not already been memorializing witness recollections to protect against "fading memories." Amazon then points to a supposed "risk [of] its experts becoming unavailable" (*id.*), but provides no reason how this could be considered a material risk when expert witnesses are under contract to provide services.

[7] *See Copyright Office Extends Deadline for Initial Determination in Web V Rate Setting Proceeding*, https://www.copyright.gov/newsnet/2020/840.html?loclr=eanco (June 6, 2020).

IV. CONCLUSION

For the reasons set forth above and in the Joint Motion, Joint Movants respectfully request that the Judges grant the Joint Motion.

Respectfully submitted,

/s/ Gary R. Greenstein
Gary R. Greenstein, Esq.
(DC Bar No. 455549)
WILSON SONSINI GOODRICH & ROSATI
1700 K Street, N.W., Fifth Floor
Washington, D.C. 20006
(P) (202) 973-8800
(F) (202) 973-8899
ggreenstein@wsgr.com

Counsel for Google LLC

/s/ Joseph R. Wetzel
Joseph R. Wetzel
Andrew M. Gass
LATHAM & WATKINS LLP
505 Montgomery Street
San Francisco, California 94111
Tel.: (415) 391-0600
Fax: (415) 395-8095
joe.wetzel@lw.com
andrew.gass@lw.com

- and –

Sarang V. Damle
Allison L. Stillman
LATHAM & WATKINS LLP
1271 Avenue of the Americas
New York, New York 10020
Tel.: (212) 906-1200
Fax: (212) 751-4864
sy.damle@lw.com
alli.stillman@lw.com

Counsel for Spotify USA Inc.

/s/ Benjamin E. Marks
Benjamin E. Marks
WEIL, GOTSHAL & MANGES LLP
767 5th Avenue
New York, New York 10153
Tel.: (212) 310-8029
Fax: (212) 310-8007
benjamin.marks@weil.com

Counsel for Pandora Media, LLC

/s/ Benjamin K. Semel
Benjamin K. Semel (N.Y. Bar No. 2963445)
Frank P. Scibilia (N.Y. Bar No. 2762466)
Donald S. Zakarin (N.Y. Bar No. 1545383)
PRYOR CASHMAN LLP
7 Times Square
New York, New York 10036
Telephone: (212) 421-4100
bsemel@pryorcashman.com
fscibilia@pryorcashman.com
dzakarin@pryorcashman.com

Counsel for National Music Publishers' Association and Nashville Songwriters Association International

/s/ George Johnson
George Johnson

Appearing pro se

Dated: May 12, 2021

Proof of Delivery

I hereby certify that on Wednesday, May 12, 2021, I provided a true and correct copy of the Reply in Further Support of Expedited Joint Motion for Suspension of Voluntary Negotiation Period and Subsequent Case Events and Deadlines to the following:

SoundCloud Operations Inc., represented by Todd Larson, served via ESERVICE at todd.larson@weil.com

Powell, David, represented by David Powell, served via ESERVICE at davidpowell008@yahoo.com

Apple Inc., represented by Mary C Mazzello, served via ESERVICE at mary.mazzello@kirkland.com

Copyright Owners, represented by Benjamin K Semel, served via ESERVICE at Bsemel@pryorcashman.com

Zisk, Brian, represented by Brian Zisk, served via ESERVICE at brianzisk@gmail.com

Amazon.com Services LLC, represented by Joshua D Branson, served via ESERVICE at jbranson@kellogghansen.com

Joint Record Company Participants, represented by Susan Chertkof, served via ESERVICE at susan.chertkof@riaa.com

Signed: /s/ Todd Larson